STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2003
v	No. 235163 Wayne Circuit Court
JAMES LANGFORD, Defendant-Appellant.	LC No. 99-000610-02

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury, as charged, of two counts of first-degree felony murder, MCL 750.316(1)(b), four counts of assault with intent to commit murder, MCL 750.83, one count of armed robbery, MCL 750.529, two counts of extortion, MCL 750.213, two counts of kidnapping, MCL 750.349, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. At sentencing, the court determined that the two felony murder convictions were merged into one (one death, two theories), and that the underlying felonies of armed robbery, extortion, and kidnapping were all merged into the felony murder conviction. The court sentenced defendant to concurrent prison terms of life imprisonment without parole for the felony murder conviction, sixty to ninety years for the first assault conviction, forty to sixty years for the second assault conviction, and thirty to sixty years for each of the two remaining assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of events that occurred on December 5, 1998. The events began with the kidnapping of Athena Akins and her son, Leroy Akins. After the victims were released, a police pursuit ensued, which culminated in the death of one officer and injuries to several others. Defendant later fled to Erie, Pennsylvania, where he was eventually apprehended.

I

Defendant raised several claims of prosecutorial misconduct. Defendant's first claim is that the prosecutor committed misconduct when he commented that a defense witness was laughing outside the courtroom following her testimony. Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v*

Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Here, however, defendant failed to preserve this issue with an appropriate objection at trial. Therefore, we review this issue for plain error (i.e., one that is clear and obvious) affecting defendant's substantial rights (i.e., that was prejudicial). *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2003).

A review of the record shows that the prosecutor's brief comment was responsive to a witness' gratuitous remark that the defense could not arrest its witnesses like the prosecution could. Considered in context, the brief remark did not amount to plain error affecting defendant's substantial rights. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

With regard to defendant's remaining claims of prosecutorial misconduct, after review of the record, we find none of the claims warrant reversal. Defendant has abandoned his claim of error concerning the prosecutor's remark during opening statement that he was "ecstatic" that the immunized witness would be going to prison. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Watson, supra* at 587. Similarly, defendant fails to cite any authority in support of his argument that the prosecutor committed misconduct by eliciting an alternative explanation for the fact that defendant did not talk about this crime with the FBI negotiator during the Pennsylvania standoff. Thus, that issue is also deemed abandoned. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

We also reject defendant's claims that reversal is required because the prosecutor appealed to the sympathies and emotions of the jurors, *Watson, supra* at 591, or engaged in civic duty arguments that appealed to the fears and prejudices of the jurors, *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998). The comment concerning Officer Bandy's father was brief and isolated and did not deprive defendant of a fair trial. The comment concerning what justice required was made in reference to the evidence at trial and concerned what the evidence showed. It was not improper. The comments concerning the victim crying out for justice and asking the jury not to compound this tragedy were made in direct response to defendant's argument that the victim would not want defendant to be convicted. Considered in this context, the comments were not improper. *Watson, supra* at 592-593. Moreover, the court instructed the jury that the case must be decided solely on the evidence, without sympathy or prejudice, and that comments and arguments of counsel are not evidence. Thus, none of these comments deprived defendant of a fair trial.

Defendant also asserts that the prosecutor improperly denigrated defense counsel. Examined in context, however, it is apparent that the prosecutor was responding to defense counsel's recollection and interpretation of the evidence. In light of their responsive nature, the prosecutor's remarks, which did not receive an objection at trial, were not plainly improper. *Watson, supra* at 592-593. Therefore, this unpreserved issue has been forfeited. *Carines, supra* at 763.

II

Next, defendant argues that the trial court erred in allowing the prosecutor to rehabilitate a witness with prior consistent statements made after a motive to fabricate had arisen. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). By the time the prosecutor attempted to rehabilitate the witness, the witness' statements had already been admitted into evidence. Because the statements had already been received, and defendant had cross-examined the witness extensively concerning inconsistent portions of the statements, the trial court did not abuse its discretion in allowing the prosecutor to explore those portions that were consistent with the witness' trial testimony. See MRE 611(a).

Defendant additionally argues, however, that the statements should never have been admitted in the first instance. We find merit to this issue, but conclude that any error does not warrant reversal.

Under MRE 801(d)(1), a prior statement of a witness is not inadmissible hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

A prior consistent statement is admissible under MRE 801(d)(1) only if it was made before the existence of a motive to fabricate. See *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001); see also *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

In this case, the witness gave statements to the police that were both consistent and inconsistent with his trial testimony. Because the statements were not given under oath at a trial or a hearing, they were not excluded from the definition of hearsay by MRE 801(d)(1)(A) (prior inconsistent statements). Similarly, the statements were made after the witness was arrested and a motive to fabricate had already arisen. Thus, the statements were also not excluded from the definition of hearsay by MRE 801(d)(1)(B) (prior consistent statements). Therefore, it appears that the trial court erred in admitting the entire statements. We conclude, however, that the error was harmless. Defense counsel cross-examined the witness extensively concerning the portions of the statements that were inconsistent with his trial testimony, and the consistent portions were cumulative of the witness' trial testimony. Thus, the substance of the statements was already before the jury. Under the circumstances, any error in admitting the statements did not affect the outcome of the trial. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

III

Next, defendant argues that the trial court erred in precluding defense counsel from cross-examining the same witness concerning the possible penalty he avoided by entering into a plea agreement with the prosecution. We agree, but again conclude that reversal is not required.

Where a witness testifies under a grant of immunity pursuant to a plea agreement, the defense must be given a full opportunity to cross-examine the witness concerning the terms of the plea agreement. *People v Jones*, 236 Mich App 396, 405; 600 NW2d 652 (1999). In *People v Bell*, 88 Mich App 345, 349; 276 NW2d 605 (1979), this Court held that the trial court abused its discretion where it prohibited the defendant from cross-examining the prosecution's "star witness" concerning the penalty he faced before entering into a plea agreement. See also *People v Mumford*, 183 Mich App 149, 153-154; 455 NW2d 51 (1990) (trial court abused its discretion when it prohibited inquiry on all details of a plea bargain, including sentencing considerations). In contrast, in *People v Holliday*, 144 Mich App 560, 564-570; 376 NW2d 154 (1985), where there was no evidence that a witness had participated in the crime, this Court held that it was not an abuse of discretion to preclude the defendant from "question[ing] the eyewitness about the possible punishment the witness may have avoided by agreeing to testify."

In the present case, there was ample evidence that the witness was an active participant in the crime, and the witness had been charged with felony-murder as well as several other serious felonies. The witness' desire to avoid the penalties associated with these charges was a powerful incentive to testify against defendant. While a jury is not ordinarily entitled to know the penalties faced by a defendant, *Holliday*, *supra* at 568; *Bell*, *supra* at 350, we agree that information concerning the possible penalties the witness here avoided by entering into the plea agreement was a proper subject of inquiry. *Mumford*, *supra*; *Bell*, *supra*.

It is apparent, however, that the witness was vigorously cross-examined concerning his involvement in the crime and his motivation for testifying. Moreover, defense counsel was successful in eliciting that, if the witness had not cooperated with the prosecution, he would have faced a substantial sentence, "more than [he] could ever do." Further, during cross-examination of another witness, defense counsel mentioned that a charge of accessory after the fact to murder carried a penalty of "life in prison." We are satisfied that the jury had a sufficient basis on which to adequately evaluate the witness' incentives for testifying. It is not more probable than not that the jury would have evaluated the witness' testimony differently had further inquiry been permitted. *Lukity*, *supra* at 495.

IV

Defendant next argues that the trial court erred in refusing to reconsider a motion to suppress his statement that was previously considered and denied by a different judge before defendant's first trial. The trial court concluded that it was bound by the first judge's ruling and, therefore, had no authority to reconsider the issue.

MCR 2.613(B) states:

> A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

Under this rule, the trial court had the authority to reconsider the admissibility of defendant's statement.

Nonetheless, to be entitled to relief, it is incumbent on defendant to demonstrate that he was prejudiced by the erroneous ruling, i.e., that, had the trial court considered the matter, there is a reasonable basis for believing that it would have suppressed defendant's statement. Defendant does not address the merits of the issue on appeal. Because this is an issue that must necessarily be decided, defendant's failure to address it precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). In any event, we agree that the statement was admissible.

It is well-settled that the police must advise a suspect of his *Miranda*[1] rights before a custodial interrogation. *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001). For purposes of *Miranda*, "custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or [has] otherwise [been] deprived of his freedom of action in any significant way." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001), quoting *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). For example, a defendant who is incarcerated on an unrelated charge is not "in custody" for purposes of *Miranda*. See *People v Herndon*, 246 Mich App 371, 396; 633 NW2d 376 (2001).

In the present case, although defendant was barricaded in a house that was surrounded by police, he was not "in custody" when he made the challenged statement. More importantly, he voluntarily got on the telephone, asked someone to place a three-party call for him, and voluntarily spoke to the police officer in question. Thus, for purposes of *Miranda*, there was no custodial interrogation initiated by law enforcement officers. Accordingly, the challenged statement was admissible. Because defendant's substantial rights were not affected by the trial court's failure to recognize its authority to consider the issue, appellate relief is not warranted. *In re Caldwell*, 228 Mich App 116, 123-124; 576 NW2d 724 (1998).

V

Defendant next argues that the trial court erred by refusing to instruct the jury on accessory after the fact, and by failing to add language to the aiding and abetting instruction advising the jury that, to find defendant guilty as an aider and abettor, it must find that he provided assistance before or during the crime. We disagree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are reviewed as a whole rather than piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The court gave the standard jury instructions on aiding and abetting. CJI2d 8.1, CJI2d 8.4 and CJI2d 8.5. The jury was specifically instructed that, in order to convict defendant on an aiding and abetting theory, it must find that he gave assistance "before or during the crime or crimes." The instruction given fairly addressed defendant's concern that he not be convicted as an aider and abettor on the basis of assistance rendered only after the crime. There was no error concerning the aiding and abetting instructions.

Accessory after the fact is a common law crime punishing "one, who with knowledge of another's guilt, renders assistance to a felon in an effort to hinder his detection, arrest, trial or punishment." *People v Perry*, 460 Mich 55, 59, 61; 594 NW2d 477 (1999). This offense is akin to obstruction of justice. *Id.* at 62. Contrary to what defendant argues, accessory after the fact is not a cognate lesser included offense of murder. *Id.* at 62-63. Further, even if it could be considered a lesser cognate offense of murder, the trial court's failure to instruct on that offense was not error because MCL 768.32 does not permit instruction on lesser cognate offenses. *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002).

VI

Next, we reject defendant's claim that the trial court erred in allowing defense counsel to rest his case without ascertaining whether defendant knowingly and intelligently waived his right to testify. In Michigan, where a defendant is represented by counsel, a trial court has no duty to inquire into the defendant's waiver of the right to testify. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

VII

Lastly, defendant argues that his trial attorney was ineffective (1) for failing to object on confrontation grounds to the prosecutor's comment that a witness was laughing, (2) for depriving defendant of his right to testify, and (3) for failing to impeach a witness with testimony from defendant's first trial. Where, as here, a defendant fails to raise the issue of ineffective assistance of counsel in a motion for a new trial or *Ginther*[2] hearing, our review of the issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that the error might have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Every effort must be made to eliminate the distorting effects of hindsight. *LaVearn*, *supra* at 216.

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

As discussed above, the prosecutor's comment that a prior witness had been laughing outside the courtroom was a permissible response to the witness' volunteered statements. Defense counsel was not ineffective for failing to make a futile objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

The record does not disclose what advice, if any, defense counsel provided concerning the decision whether to have defendant testify. Because it is not apparent from the record that defense counsel improperly prevented defendant from testifying, this claim must fail.

Defendant lastly complains that defense counsel failed to impeach a witness with his prior trial testimony in which the witness stated that, on the night after the crime, defendant denied any involvement in the kidnapping. Unless a defendant can overcome the presumption of sound trial strategy, whether and how to impeach witnesses is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). In this case, there is no reasonable possibility that pointing out one more alleged inconsistency in this witness' testimony would have changed the outcome. Defendant has failed to show that counsel committed serious prejudicial error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra